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**From:** Brenda L. Tavera <BTavera@DDSFFIRM.com>  
**Sent:** Thursday, July 03, 2014 12:11 PM  
**To:** Berninger, Stephen  
**Cc:** 'James C. Stull (jcstull@continentalht.com)'; 'trsvcs@hotmail.com'; 'Julian A. Pollok Esq. (polloklaw@aol.com)'; Jennifer T. Taggart; Michael A. Francis  
**Subject:** Omega Chemical Corporation Superfund Site re 10643 Norwalk Boulevard, Santa Fe Springs, CA  
**Attachments:** L - Berninger, Stephen (EPA) re CHT response.07-03-14.pdf

Please see attached letter from Michael A. Francis, Esq. in connection with the above-referenced matter. Please contact Mr. Francis with any questions.  
Thank you.

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July 3, 2014

**VIA E-MAIL [berninger.stephen@epa.gov] AND U.S. MAIL**

Mr. Stephen Berninger  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
75 Hawthorne Street, Region IX  
San Francisco, California 94105-3901

**Re: Omega Chemical Corporation Superfund Site in Los Angeles County, CA  
General Notice Letter issued to Continental Heat Treating, Inc.  
Re 10643 Norwalk Boulevard, Santa Fe Springs, CA**

Dear Mr. Berninger:

Thank you for your letter dated June 2, 2014 regarding my client Continental Heat Treating, Inc.'s ("CHT") response to the Environmental Protection Agency's ("EPA") December 18, 2013 General Notice Letter and Request for Information with respect to the property located at 10643 Norwalk Boulevard, Santa Fe Springs, CA ("Property") in connection with the Omega Chemical Corporation Superfund Site ("Omega Site").

CHT and I are willing to meet with the appropriate EPA and Department of Justice ("DOJ") representatives either via telephone conference or in person to discuss this matter in more detail. Please contact me at your convenience to make the arrangements.

In light of EPA's June 2, 2014 letter, we believe it would be beneficial to further explain CHT's position regarding the EPA's General Notice Letter and Request for Information with respect to the Omega Site. Therefore, we respond herein to the contentions made in your June 2, 2014 letter with respect to CHT's settlement of its liability with respect to the Omega Site in the Administrative Order on Consent ("AOC") finalized on December 12, 2005 ("2005 AOC").

As threshold matters, CHT was an Option A Respondent and one of the stated mutual objectives of the Parties entering into the 2005 AOC was to "reach a final settlement . . . that allows the Option A Respondents . . . to make a cash payment, including a premium, to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, . . . and the California Hazardous Substances Account Act . . . for injunctive relief with regard to the Site and for response costs incurred and to be incurred at or in connection with the Site, thereby reducing litigation relating to the Site." Another stated mutual objective was "to simplify the remaining

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administrative and judicial enforcement activities concerning the Site by eliminating a substantial number of potentially responsible parties from further involvement at the Site.” Thus, it is clear that the 2005 AOC was intended as, and it is in fact, a final settlement resolving all of the Respondents’, including CHT’s, liabilities with respect to the Site.

Paragraph 27 of the 2005 AOC provides that in consideration of the payment made by Respondents, the “United States covenants not to sue or take administrative action against any of the Option A Respondents” under Sections 106 and 107 of CERCLA “relating to the Site.” The United States’ reservation of rights against the Option A Respondents was relatively limited, as set forth in Paragraph 31 of the 2005 AOC.

According to the June 2, 2014 letter, it appears that the United States now seeks to ignore the 2005 AOC and impose CERCLA liability on CHT based upon alleged releases from its Property. The United States contends that these alleged releases have resulted in groundwater contamination present in Operable Unit 2 of the Omega Site.

However, the United States is barred from taking such actions against CHT because the United States provided a broad, unqualified covenant not to sue or take administrative action against any Option A Respondent under CERCLA “relating to the Site” in the 2005 AOC. The 2005 AOC defines the “Site” to mean “the Omega Chemical Superfund Site located at 12504 and 12512 East Whittier Boulevard, Whittier, California, Los Angeles County, California, and generally shown on the maps attached as Appendix C.” (2005 AOC § III, ¶ 6(o).) The map attached as Exhibit C depicts the Omega Chemical Corp. facility as a small box in the northeast corner. The Omega Site as described in the map’s legend includes groundwater contamination plumes of PCE, TCE, Freon 11 and Freon 113.

The “Site” is further described in the 2005 AOC Section IV, the Statement of Facts. It states in Paragraph 9(f) that the Site was divided into two operable units (“OUs”). Operable Unit Two (“OU2”) is defined as “all other areas where contamination associated with the Omega facility has come to be located, specifically the groundwater plume which extends downgradient of the Phase 1a Area.” The OU2 groundwater contaminant plume is shown emanating from the former Omega Chemical Corp. facility, extending southwest.

Thus, pursuant to the plain language of the 2005 AOC, the “Site” includes the groundwater contaminant plumes emanating from the former Omega Chemical Corp. facility. As such, the covenant not to sue in the 2005 AOC prohibits the United States from pursuing additional claims against CHT relating to or concerning the “Site”, including the groundwater contamination plumes which are specifically defined to be part of the “Site.”

The EPA’s June 2, 2014 letter also asserts that because the Property is not within the groundwater contaminant plumes depicted on the map attached as Exhibit C to the 2005 AOC, it cannot be part of the Site. However, the United States’ covenant not to sue is not so limited.

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Instead, it is a covenant not to sue CHT under CERCLA for all matters relating to the Site, except as expressly reserved.

EPA attempts to limit the discharge of CHT's CERCLA liability with respect to the Site by limiting the Site to the exact and precise contours depicted in the map in Exhibit C. This is inconsistent with the 2005 AOC's plain language and the EPA's course of conduct with respect to this particular Superfund site and other Superfund sites as well. First, the map is a two dimensional representation of a three dimensional plume. Second, a groundwater contamination plume is not static. It changes and moves. It is affected by recharge rates, pumping rates, and a myriad of other factors. Third, the contours of the plumes themselves are representations derived from mathematical models based upon fixed and limited data points. The mathematical formulas and models fill in the gaps between the fixed and limited data points to derive a representation of estimated contour of the groundwater contamination plume. But it is just a representation, with errors and problems depending on the number of valid data points and the mathematical model used. By its very nature, it is relatively imprecise. The EPA cannot seriously be asserting that the Site definition is limited to the fixed contours of the groundwater contamination plumes depicted on this particular map. Further, EPA has since depicted the Omega Site groundwater plume differently to cover a much larger area. These later OU2 plume figures include the Property. Finally, the precise contours of a groundwater contamination plume at a Superfund site are subject to change based upon the information gathered from various environmental investigations and assessments. The definition of "Site" in the EPA's various documents incorporates those changes, revisions and refinements to the groundwater contamination plume(s). These are precisely the reasons why the Site is defined in the 2005 AOC to include "all other areas where contamination associated with the Omega facility has come to be located, specifically the groundwater plume which extends downgradient of the Phase 1a Area."

Based upon the foregoing, CHT is confident that the plain language of the 2005 AOC unequivocally supports a finding that CHT has discharged its CERCLA liability with respect to the "Site."

The EPA also asserts that the 2005 AOC is limited to CHT's liability for arranging for disposal or generator liability. However, the 2005 AOC's covenant not to sue is not limited to a particular type of CERCLA liability. In fact, it is devoid of any language limiting it to arranger liability. It simply provides a covenant not to sue for matters relating to the Site.

While the Statement of Facts does contain a statement that each of the Respondents arranged for disposal, or arranged with a transporter for disposal, at the subject site, it does not limit the Respondents only to those parties. Had the United States desired to limit the Respondents to discharging only such liability, or desired to reserve its rights to pursue Respondents for other liabilities under CERCLA, they could have. The United States certainly knows how to draft such provisions as evidenced by the reservation of rights provisions in all such agreements and as it has done in settlements at other Superfund sites. The United States'

failure to make such a reservation suggests that the covenant not to sue it gave was exactly what the plain language says it is – a covenant not to sue under CERCLA for liability relating to the Site.

The Statement of Facts also contains an assertion that each Respondent contributed less than ten (10) tons. While CHT does not concede that this factual statement limits the release of liability in the 2005 AOC, CHT will assume nonetheless that this was a limit on participation in this settlement agreement. The appendix to the 2005 AOC indicates that CHT contributed 7.2558 tons. There are no facts whatsoever to suggest that CHT released an additional 2.7 tons at the Property to the Site. Thus, the ten (10) ton limit has not been exceeded (assuming *arguendo* that such a limit exists and that there was a release at the Property).

The Site, as defined in the 2005 AOC, consists of the former Omega Chemical Corp. facility itself plus the groundwater contamination plumes extending from the former Omega Chemical Corp. facility, or OU2. It encompasses the very Property for which the EPA now seeks to impose additional CERCLA liability on CHT. The December 18, 2013 letter from the EPA indicates that the Omega Site for which CHT may be a potentially responsible party and therefore liable under CERCLA refers to the “former Omega Chemical property in Whittier, as well as the extent (i.e., plume) of contaminant groundwater emanating from the Omega Chemical property, much of which has commingled with chemical released at other locations into a continuous plume approximately four and one-half miles long, and one and one-half miles wide.” It further identifies OU2 and describes the actions that have been taken with respect to OU2 and for which EPA now seeks to impose liability on CHT, among others.

The EPA contends that the term “Site” as used in the 2005 AOC could not have included other potential areas where contamination might be later discovered because of the disclosure obligation in Paragraph 25 of the 2005 AOC. If information was not disclosed regarding other potential areas, then the definition of Site could not include those potential other areas of contamination. The letter further contends that the United States’ covenant not to sue a Respondent for future liability was conditioned on that Respondent’s performance of all obligations including the certification. The EPA states that it knows of “no information provided by CHT about the downgradient Property when asked to certify it had searched for and disclosed to EPA all information relating to the Site.”

This statement is incorrect. The EPA had information relating to the Property in its possession, and this information was made available to the EPA by CHT prior to the 2005 AOC. In fact, prior to the entry of the 2005 AOC, EPA, the DTSC (also a Party to the 2005 AOC), and the RWQCB were actively investigating and reviewing available information from nearby sources, including the Property, prior to the entry of the 2005 AOC. DTSC was working on the EPA’s behalf in connection with the investigation of the Omega Site and specifically OU2. The DTSC visited the Property on December 15, 2000. At that time, CHT delivered to Lori Parnass, DTSC’s Omega Site Project Manager, a number of reports and documents, including a 1995 Site

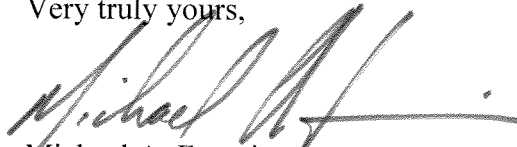
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Investigation Report, a 1996 Soil Gas Survey Report, and a 1997 Site Assessment Report. Further, CHT, through its environmental consultant, provided the DTSC with follow up information, including by letter dated December 22, 2000.

EPA issued CHT a Preliminary Assessment dated June 31, 2001 [presumably June 30, 2001], prepared by Lori Parnass, DTSC's Omega Site Project Manager, which documented CHT's solvent use and VOCs detected in the soil and soil vapor from the surface to approximately sixty (60) feet below ground surface ("bgs"), and also documented VOC contamination more than 150 feet laterally from the CHT operations area. The EPA and its contractors also visited the Property and collected soil and groundwater samples on several occasions prior to the entry of the 2005 Consent Decree, including in 2002 and 2003. In fact, an EPA letter dated February 20, 2003 from Betsy Curnow, Chief, States, Tribes and Assessment Section, Superfund Division, states that EPA is conducting a site investigation of the Property "to investigate sources of contamination that may have impacted groundwater in the vicinity of the site." It is abundantly clear that CHT disclosed what information it had to the EPA and the EPA's consultants. Further, CHT allowed EPA and its consultant's access to the Property to collect whatever samples the EPA desired. For your reference, the EPA representative collecting the 2002 – 2003 CHT information was Mr. Matt Mittgard. EPA's statement that it knows of no information provided about the Property is contradicted by the wealth of information and data provided and gathered over many years prior to the 2005 AOC.

Based upon the foregoing, it is clear on the face of the 2005 AOC that EPA and California discharged CHT from all of its alleged liability for the Omega Site in the 2005 AOC. Further, in light of the above facts, it is difficult to understand how the EPA could continue to pursue any claims against CHT with respect to the Omega Site because no remaining viable bases to assert liability against CHT exist. Nevertheless, CHT and I are willing to meet with the appropriate EPA and DOJ representatives to discuss this matter further should the EPA still request such a meeting.

Very truly yours,



Michael A. Francis

JTT:MAF/blt

cc: Mr. James Stull (Via E-mail)  
Mr. Robert Schneider (Via E-mail)  
Julian A. Pollok, Esq. (Via E-mail)